In The

Supreme Court of the United States

October Term, 1968

No. 413

STATE OF NORTH CAROLINA,
WARDEN R. L. TURNER,
Petitioners,

vs.

CLIFTON A. PEARCE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS,

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BRIEF FOR THE PETITIONERS

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix 15-16) is reported as CLIFTON A. PEARCE v. STATE OF NORTH CAROLINA, WARDEN R. L. TURNER, 397 F. 2d 253 (4th Cir. 1968).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1). The petition for a writ of certiorari was granted on October 28, 1968.

QUESTION PRESENTED

MAY DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON APPEAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Clifton A. Pearce was initially tried at the May 1961 Term of the Superior Court of Durham County, North Carolina, on a charge of rape. Upon arraignment the prosecuting attorney elected to try Pearce for the offense of assault with intent to commit rape. A verdict of guilty of assault with intent to commit rape was returned by the jury. Pearce was sentenced to a term of imprisonment of not less than twelve nor more than fifteen years.[1]

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[1] Pearce began serving this twelve to fifteen years sentence on May 26, 1961. The approximate expiration date of this sentence, assuming that Pearce would have received all allowances of time for good behavior, was November 13, 1969.

In 1965 Pearce applied for and obtained a Post Conviction review and on May 10, 1965, W. J. Johnson, Judge Presiding at the May 1965 Criminal Session of Durham Superior Court, entered an Order denying relief. The Supreme Court of North Carolina granted Certiorari to review Judge Johnson's Order and awarded Pearce a new trial "upon the ground that the trial court committed error in admitting, over defendant's objection, (his) confession . . . ." This case is reported in 266 N.C. 234, 145 S.E. 2d 918 (1966).

A new Bill of Indictment charging assault with intent to commit rape was returned against Pearce by the Grand Jury at the March 1966 Session of the Durham Superior Court. Pearce was tried at the June 6, 1966 Two-Week Criminal Conflict Session, Durham Superior Court. The jury returned a verdict of guilty as charged and a prison sentence of eight years was imposed.[2] Pearce appealed to the Supreme Court of North Carolina which affirmed the conviction. 268 N. C. 707, 151 S.E. 2d 571 (1966).

In March 1967, Pearce applied to the United States District Court for the Eastern District of North Carolina for a Writ of Habeas Corpus. In July 1967 Pearce filed a "Motion to Amend Petition for Writ of Habeas Corpus." On November 20, 1967, the District Court entered an Order voiding Pearce's second sentence under the decision of PATTON v. STATE OF NORTH CAROLINA, 381 F. 2d 636 (4th Cir. 1967), cert. den. 390 U.S. 905 (1967). The Order further directed that the State of North Carolina "proceed to re-sentence said Clifton A. Pearce within sixty days from the date of service of this Order" and if the State of North Carolina does not so elect, "this Court will entertain a motion on behalf of the petitioner for an order releasing him from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County upon his conviction of assault with intent to commit rape." Appendix 4-6.

On November 30, 1967, James H. Pou Bailey, a Judge of

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[2] Pearce began serving this sentence on February 6, 1967. The approximate expiration date of this sentence, assuming Pearce would have received all allowances of time for good behavior, was October 10, 1972.

the Superior Court of North Carolina and Judge Presiding at the November 1967 Term of the Superior Court of Durham County, entered an Order electing not to re-sentence Pearce. Appendix 7-11.

On February 1, 1968, the United States District Court for the Eastern District of North Carolina entered a Writ of Habeas Corpus ordering Pearce's immediate release "from all restraint imposed by virtue of the sentence of eight years imprisonment imposed at the June 1966 Session of the Superior Court of Durham County, North Carolina, upon his conviction of assault with intent to commit rape." Appen. 12-14.

The State of North Carolina and Warden R. L. Turner appealed the District Court's decision to the Fourth Circuit Court of Appeals. The Circuit Court, on June 19, 1968, in a Memorandum Decision based upon PATTON v. STATE OF NORTH CAROLINA, 381 F. 2d 636 (4th Cir. 1967), affirmed the District Court's ruling.

ARGUMENT

MAY DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON APPEAL?

The Supreme Court of North Carolina has previously answered the single question presented and established the following rules: "When, upon defendant's application, a sentence is set aside and a new trial ordered, the whole case is tried de novo. The former judgment, therefore, does not fix the maximum punishment which may be imposed after a second conviction. STATE v. PEARCE, 268 N.C. 707, 151 S. E. 2d 571; STATE v. SLADE, 264 N. C. 70, 140 S.E. 2d 723; STATE v. MERRITT, 264 N.C. 716, 142 S.E. 2d 687; STATE v. WHITE, 262 N.C. 52, 136 S.E. 2d 205, *cert. denied*, 379 U.S. 1005 (1965). The total of the time served under the two sentences, however, may not exceed the maximum sentence authorized by the applicable statute. STATE v. FOSTER, 271 N.C. 727, 157 S.E. 2d 542; WILLIAMS v. STATE, 269 N.C. 301, 152 S.E. 2d 111; STATE v. WEAVER, 264 N.C. 681, 142 S.E. 2d 633; STATE v. SLADE, *supra*.

Furthermore, on *any* subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence. STATE v. PAIGE, 272 N.C. 417, 158 S.E. 2d 522; STATE v. WEAVER, *supra.*" STATE v. STAFFORD, No. 495, Fall Term 1968, Supreme Court of North Carolina, December 9, 1968, 274 N.C. ____, ____ S.E. 2d ____ (1968).

The rule followed in North Carolina that a defendant once convicted may, upon that conviction and sentence being reversed, be subjected to a more severe sentence upon a new trial for the same offense is the prevailing rule of the state courts which have been faced with the issue. REEVES v. STATE, 3 Md. App. 195, 238 A. 2d 307 (1968); STATE v. YOUNG, 200 Kan. 20, 434 P. 2d 820 (1967); MOON v. STATE, 1 Md. App. 569, 232 A. 2d 277 (1967); SALISBURY v. GRIMES, 223 Ga. 776, 158 S.E. 2d 412 (1967); STATE v. SQUIRES, S.C., 149 S.E. 2d 601 (1966); MORGAN v. COX, 75 N.M. 472, 406 P. 2d 347 (1965); HOBBS v. STATE, 231 Md. 533, 191 A. 2d 238 (1963), cert, den. 375 U.S. 914 (1963); HICKS v. COMMONWEALTH, 345 Mass. 89, 185 N.E. 2d 739 (1962), cert. den. 374 U.S. 839 (1962); SANDERS v. STATE, 239 Miss. 874, 125 So. 2d 923, 85 A.L.R. 2d 481 (1961); TILGHMAN v. CULVER, Fla., 99 So. 2d 282 (1957), cert. den. 356 U.S. 953 (1958); BOHANNON v. DISTRICT OF COLUMBIA, Mun. Ct. of Appeals of the District of Columbia, 99 A. 2d 647 (1953); COMMONWEALTH EX REL. WALLACE v. BURKE, 169 Pa. Super. 633, 84 A. 2d 254 (1951); COMMONWEALTH v. ALESSIO, 313 Pa. 537, 169 A. 764 (1934); STATE v. KNEESKERY, 203 Iowa 929, 210 N.W. 465 (1926); STATE v. MORGAN, 145 La. 585, 82 So. 711 (1919); MANN v. STATE, 23 Fla. 610, 3 So. 207 (1887). Accord, 21 AM. JUR. 2d, CRIMINAL LAW, §570; 39 AM. JUR, NEW TRIAL, §217; 24 C.J.S., CRIMINAL LAW, §1426; 66 C.J.S.. NEW TRIAL, §226; Anno: "Propriety of Increased Punishment on New Trial For Same Offense," 12 A.L.R. 3rd 978 (1967). Contra, PEOPLE v. HENDERSON, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963); STATE v. WOLF, 46 N.J. 301, 216 A. 2d 586, 12 A.L.R. 3rd 970 (1966); STATE v. TURNER, Or., 429 P. 2d 565 (1967).

In HOBBS v. STATE, *supra*, the defendant in 1947 pleaded guilty to three charges of armed robbery and was sentenced to twenty years on each charge, the sentences to run concurrently. In 1962, as a result of a Habeas Corpus petition filed in the United States District Court, the State conceding that the defendant was not represented by counsel at his first trial, a new trial was awarded. In October, 1962, after having had counsel appointed to represent him, the defendant pleaded not guilty to the three indictments of armed robbery. He was found guilty by the jury on two of the three indictments and sentenced to twenty years in one case and five years in the other, the sentences to run consecutively from the date of his original sentence. This amounted to five years more than his previous sentence. In affirming the longer sentence the highest appellate court in Maryland said, "(i)n asking for and receiving a new trial, appellant must accept the hazards as well as the benefits resulting therefrom." 191 A. 2d at 240. The Court further stated, "(o)n a trial de novo the Court hears the case as if it were being tried for the first time and considers the entire matters of verdict, judgment and sentence as if there had been no prior trial." Id. at 240.

In REEVES v. STATE, *supra*, the Maryland Court of Special Appeals very recently reaffirmed the position taken by the Court of Appeals in HOBBS, i. e., "that the imposition of a sentence at the second trial which results in a greater period of confinement than called for in the sentence imposed at the first trial is not unlawful." 238 A. 2d at 312. The Court made it quite clear, however, that the time served by a defendant under a conviction later voided and the time imposed upon retrial together could not exceed the statutory maximum allowed for the crime. The position taken by Maryland is in accord with the North Carolina view. STATE v. WEAVER, 264 N.C. 681, 142 S.E. 2d 633 (1965)

In BOHANNON v. DISTRICT OF COLUMBIA, *supra*, defendant was convicted of failing to yield the right-of-way after stopping at a stop sign and sentenced to pay a fine of $10.00 or in default thereof to serve ten days. Upon motion

by the defendant a new trial was granted. He was again found guilty and sentenced to pay a fine of $100.00, or in lieu thereof, a thirty day term of imprisonment. The Municipal Court of Appeals for the District of Columbia, after noting that the judgment was within statutory limits, said: "We readily appreciate appellant feeling that the obtaining of a new trial after the first conviction was a hollow victory, since it resulted in a second conviction and fine ten times as much as the one first imposed. This, however, was a risk he took and the second judge was not bound to impose the same fine given by the first judge." 99 A. 2d at 648.

In SALISBURY v. GRIMES, *supra*, the defendant was tried and convicted (the offense is not specified in the opinion) and sentenced to ten years imprisonment. The defendant's request for a new trial was granted. Upon retrial the defendant was again convicted (we assume for the same crime) and sentenced to a term of imprisonment of thirteen years. The defendant filed a petition for a writ of habeas corpus in the Superior Court of Fulton County contending, among others, that the imposition of a harsher sentence following a successful appeal violated the equal protection clause of the Fourteenth Amendment. The Superior Court dismissed the petition and the defendant appealed. In affirming the lower court's dismissal, the Supreme Court of Georgia stated:

> "Appellant twice moved for a new trial and such requests for new trial were granted on his own motion. When appellant was granted a new trial, it wiped the slate clean as if no previous conviction and sentence had existed. In electing to have his case retried, appellant must have contemplated the possibility of having the jury impose a harsher sentence if he were convicted again. (Citations omitted). Yet, appellant did seek a new trial, and the jury carried out its duty by prescribing his sentence." 158 S.E. 2d at 414.

In STATE v. JACQUES, 99 N.J. Super 230, 239 A. 2d 252 (1968), defendant was tried and convicted in 1966 in a two-count indictment charging robbery and being armed in the perpetuation of the robbery. He was sentenced to three to

five years for the robbery and two years for being armed, the latter sentence to run consecutively with the first. On appeal to the Superior Court, the conviction was reversed. The defendant was again tried upon the same charges, found guilty and sentenced to a term of six to eight years for the robbery and a consecutive term of one to two years on the charge of being armed. The defendant appealed to the Superior Court contending that the sentences imposed upon retrial be modified so as not to exceed the sentences imposed upon the initial trial. The Superior Court refused to modify the sentences imposed. In so holding, the Court noted, 239 A. 2d at 258:

> "At oral argument counsel agreed that the probation reports which were available to the first and second sentencing trial judges be submitted and considered by the court. This has been done. The probation reports disclose among other things that subsequent to the first sentencing defendant was under charges of breaking, entering and larceny and armed robbery in Middlesex County. The record shows that on May 11, 1967 he was convicted by a jury for the crime of breaking and entering with intent to steal. On May 24, 1967 defendant was convicted of armed robbery. He was sentenced on August 21, 1967.
>
> "On June 9, 1967, when defendant was sentenced on the armed robbery charge in Union County, Judge Barger was aware that defendant was to be sentenced in Middlesex County for the crimes of which he was found guilty. He was given full credit for time spent in official confinement. The presentence reports and transcript of sentence proceedings disclose a background of defendant's lawlessness. Undoubtedly the experienced trial judge considered the convictions in Middlesex County in light of the defendant's criminal background and determined that the public safety and welfare required the new sentences."

And, as the Court concluded:

> "Our holding here relates solely to the factual situation

presented. We have examined the record and we are satisfied that the imposition of the more severe sentences rested on a substantial and not an arbitrary basis. The reason for the sentences does not violate procedural policies or 'standards consistent with the just administration of the criminal law'." 239 A 2d at 259.

At least four Federal Circuit Courts have held, in varying degrees, that upon new trial the trial judge may impose a sentence greater than the one vacated.

In MARANO v. UNITED STATES, 374 F. 2d 583 (1st Cir. 1967), defendant received a sentence of three years after being convicted in the United States District Court of receiving stolen goods transported in interstate commerce. Upon appeal his conviction was set aside and a new trial granted. At his second trial he was convicted of the same offense and received a five year sentence. The same judge presided at trial and sentencing at both trials. The District Court, in imposing the five year sentence, expressly disclaimed that it was penalizing the defendant for having appealed and gave two reasons for increasing the sentence: "Mr. Marano's sentence was based on evaluation of the pre-sentence report and the additional testimony which came out at the trial." The First Circuit Court of Appeals held that defendant's right of appeal must be "unfettered" and concluded that the increased sentence based on additional testimony adduced at the retrial was improper. "As we have recently held, a defendant's right of appeal must be unfettered." WORCHESTER v. COMMISSIONER OF INTERNAL REVENUE, 1 Cir. 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such a certainty, WORCHESTER v. INTERNAL REVENUE, *supra,* he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." 374 F. 2d at 585. The Court did, however, recognize an exception with respect to presentence reports, stating,

"We do not think it inappropriate for the Court to take subsequent events into consideration, both good and bad." 374 F. 2d at 585. The Court pointed out that if a sentence was increased following retrial the "grounds for doing so should be made affirmatively to appear." Id. at 585-586, N. 3.

The question presented the Court in NEWMAN v. RODRIGUEZ, 375 F. 2d 712 (10th Cir. 1967) was: "Is the State of New Mexico required under the equal protection clause of the United States Constitution to give credit for time served on a void sentence upon reconviction following a new trial." Id. at 712.

Newman, in December, 1963, without the aid of counsel, pleaded guilty to obtaining money by fraud and was sentenced to one to five years. He was ordered released in a state habeas corpus proceeding in June, 1964, on the ground that his guilty plea was invalid. Two months later, now represented by counsel, he pleaded not guilty to the same charge and was convicted and sentenced again to one to five years. Credit was denied him for the time spent in prison on the vacated conviction. Without articulating its reasons the Court of Appeals for the Tenth Circuit concluded that the denial by New Mexico of credit for the time served on a void sentence was not constitutionally impermissible.

In UNITED STATES EX REL. STARNER v. RUSSELL, 378 F. 2d 808 (3rd Cir. 1967), cert. den. 389 U.S. 889 (1967), reh. den. 389 U.S. 997 (1967), the defendant pleaded guilty in the State Court to eight counts of forgery and two counts of burglary and was sentenced to two to eight years. The conviction was thereafter set aside on the ground that right to counsel had been violated. The defendant was then tried and convicted on the forgery counts (the burglary counts were evidently dropped) and sentenced to three and one-half to seven years. The defendant filed a Petition for Writ of Habeas Corpus in the United States District Court and the Court held that the second sentence was unconstitutional because of the insufficiency of the sentencing court's reason for imposing a greater sentence. 260 F. Supp. 265 (M.D. Pa. 1966). The opinion of the District Court was based on PATTON v. STATE OF NORTH CAROLINA, 256 F. Supp. 225

(W.D. N.C. 1966). On appeal, the Third Circuit held that the increased sentence was not improper and reversed:

The Court was shocked that the integrity of the trial judge was being challenged, as had successfully been done in MARANO and the District Court Opinion in PATTON. As the Third Circuit Court of Appeals stated:

> "We differ with the Court's (MARANO) opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive—penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in light of the wider, factual area incompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty . . . When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered." 378 F. 2d at 811.

The Court concluded that Federal review of State sentencing practices "would be a flagrant trespass of an independent state judiciary" and a decision by the highest tribunal of the State should not be vacated "unless it clearly flouted constitutional standards of due process." 378 F. 2d at 812.

See also, UNITED STATES v. FAIRHURST, 388 F. 2d 825 (3rd Cir. 1968), cert. den. ____ U.S. ____ (1968).

In UNITED STATES v. WHITE, 382 F. 2d 445 (7th Cir.

1967), cert. den. 389 U.S. 1052 (1968), the Seventh Circuit Court of Appeals specifically declined to follow the Fourth Circuit Court of Appeals decision in PATTON v. NORTH CAROLINA, 381 F. 2d 636, (4th Cir. 1967) and the First Circuit Court of Appeals decision in MARANO v. UNITED STATES, 374 F. 2d 583 (1st Cir. 1967). In determining that the imposition of a longer sentence at the second trial than was imposed at the first trial did not violate the due process clause of the Fourteenth Amendment nor the double jeopardy provision of the Fifth Amendment, the Seventh Circuit stated that "we approve of the statement of the Third Circuit in UNITED STATES EX REL. STARNER v. RUSSELL, No. 16392, (3rd Cir., May 25, 1967), that a trial judge, 'when a new trial is ordered, may impose a sentence greater than the one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence.' " 382 F. 2d at 449-50.

As to the argument that imposing a longer sentence at the second trial than was imposed at the first trial violated the double jeopardy provision of the Fifth Amendment, the Seventh Court of Appeals stated:

> "Similarly as to the defendant's double jeopardy argument, we do not believe that the Fifth Amendment prohibits different punishments upon reconviction for the same crime following a successful appeal when the punishment, whether imposed by the same or a different district judge, results from the judge's exercise of his traditional discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.
>
> "We are fully aware of the recent decisions of other courts, dealing with these and related questions, which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as that discussed in certain of these decisions and urged here by the defendant should await the considered judgment of the Supreme Court, particularly as that Court may choose to refine or abandon whatever

distinctions remain between GREEN v. UNITED STATES, 355 U.S. 184 (1957), and STROUD v. UNITED STATES, 251 U.S. 15 (1919)." 382 F. 2d at 448.

PATTON v. NORTH CAROLINA, 381 F. 2d 636 (4th Cir. 1967), cert. den. 390 U. S. 905 (1967), upon which PEARCE is bottomed, takes issue with the "discretionary" point of view represented in varying degrees by the State and Federal cases discussed.

Patton, unrepresented by counsel, was tried and convicted of armed robbery in October, 1960, after pleading nolo contendere at the close of the State's evidence. He was sentenced to twenty years. No appeal was taken. After the decision in GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), he applied for post-conviction relief and was awarded a new trial. At the second trial on the original indictment, this time with the assistance of counsel, he was convicted and was again sentenced to twenty years. Patton applied to the Federal District Court for habeas corpus where Craven, Circuit Judge, said that "the heart of the question" is "the motivation of the second judge." Judge Craven held that the harsher sentence (since credit has not been "effectively" allowed for the time spent in prison) was a denial of due process and equal protection and a violation of the constitutional doctrine. PATTON v. STATE OF NORTH CAROLINA, 250 F. Supp. 225 (W.D. N.C. 1966). The District Court reasoned that the imposition of a harsher penalty, whether a denial of credit for time served or by increased sentence, without there being contained in the record any facts to rationally support the imposition of a harsher sentence, inhibits an individual's right to appeal and unconstitutionally conditions that right.

Affirming on appeal, the Fourth Circuit Court of Appeals held the Due Process Clause, the Equal Protection Clause, and the constitutional prohibition against double jeopardy all require a uniform rule barring the subsequent imposition of a sentence in excess of one which has been invalidated, stating that 'in order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old." A closer analysis of the Court's reasoning in PATTON is warranted.

I. DUE PROCESS

The PATTON Court agreed with MARANO that additional testimony upon retrial is an insufficient basis to increase sentence, but disagreed with MARANO's dicta that events subsequent to the first trial may provide such a justification. The Court thought that the possibility of a harsher sentence under any circumstances would operate as an "unreasonable condition" or limitation on the right of appeal.

This argument assumes that the second trial judge, in imposing a harsher sentence upon retrial and conviction, will *always* penalize the appellant for having exercised his right to appeal. To adopt such an absolutist doctrine questions the very basis of our system of jurisprudence. As emphasized by Sharp, J., in STATE v. STAFFORD, *supra:*

> "Historically, the presumption has been that a judge will act fairly, reasonably and impartially in the performance of the duties of his office, ... (Citation omitted). Our entire judicial system is based upon the faith that a judge will keep his oath. Since, however, *all* judges are human, from time to time one or more will err. Notwithstanding, we have no choice but to make men judges. * * * So long as errants make it necessary for other men to judge them it is best to indulge the presumption that a judge will do what a judge ought to do. Actually we have no other choice. Furthermore, men seek to justify the confidence they believe to be reposed in them.
>
> "It would demean the entire judiciary for the appellate branch to assume that trial judges—who bear the brunt of the administration of justice and from whose ranks so many ascend to courts of last resort—will penalize with 'harsher' sentences one who appeals or exercises a constitutional right which entitled him to a new trial. In our lexicon a sentence is harsh only when it exceeds merited punishment." 274 N.C. at ____.

Subject only to the constitutional provision forbidding the States to deprive persons of their life, liberty, or property, without due process of law, "(t)he power to prescribe the

penalty to be imposed for commission of a crime rests with the legislature, not with the courts." 21 AM. JUR. 2d, CRIMINAL LAW §577. As stated by this Court in COLLINS v. JOHNSTON, 237 U.S. 502, 510 (1915), "to establish appropriate penalties for the commission of crime, and to confer upon judicial tribunals a discretion respecting the punishment to be inflicted in particular cases, within limits fixed by the lawmaking power, are functions particularly belonging to the several states . . ."

At his second trial, Pearce was convicted of assault with intent to commit rape which, as provided for by our legislature, may be punished by a term of imprisonment of one to fifteen years. N. C. G. S. 14-22. To adopt the conclusion in PATTON that the sentence imposed upon the first trial sets the maximum punishment that may be imposed upon a retrial is an unwarranted infringement both on the sovereign power of the State to prescribe the penalty to be imposed for a crime and the discretion of the trial court to impose a penalty within the statutory maximum.

In North Carolina, where a defendant pleads guilty, or nolo contendere, which is equivalent to a plea of guilty in this State, STATE v. WORLEY, 268 N.C. 687, 151 S.E. 2d 618 (1966), the necessity of proof by the State is obviated. STATE v. CALDWELL, 269 N.C. 521, 153 S.E. 2d 34 (1967). It is common knowledge that trial judges, in considering a plea of guilty as an indication that "the defendant has already entered on the rehabilitative process . . . (and) is purging himself thereby of his wrong doing," UNITED STATES EX REL. STARNER v. RUSSELL, *supra*, at 811, generally extend more leniency than when the defendant goes to trial. Where a defendant pleads guilty and is later awarded a new trial for a constitutional defect, e. g., lack of counsel, enters a plea of not guilty, and the State presents evidence not produced at the first trial of the gravity of the crime charged and that the defendant had habitually engaged in other misconduct, upon conviction, if either PATTON or MARANO is adopted the discretion of the trial judge to impose an appropriate sentence would be unduly fettered. As stated by Mr. Justic Black in WILLIAMS v. NEW YORK, 337 U.S. 241, 247 (1949):

> "A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

In this case on appeal, the following judgment was tendered by the second trial judge:

> "It is the intention of this Court to give the defendant a sentence of fifteen years in the State Prison; however it appears to the Court from the records available from the Prison Department that the defendant has served 6 years, 6 months and 17 days flat and gain time combined, and the Court in passing sentence in this case is taking into consideration the time already served by the defendant. IT IS THE JUDGMENT of this Court that the defendant be confined in the State's Prison for a period of eight years." Appendix 3.

Surely this does not support the fears exemplified in PATTON, but, conclusively exhibits the contrary.

Furthermore, if such a lack of integrity is to be assumed in our trial judges, can these same judges not easily circumvent PATTON by imposing the maximum sentence at the first trial?

We conclude, therefore, that "(w)eighing the danger that on a second trial the judge will vindictively punish a prisoner for asserting his rights against the hazards which accompany a flat prohibition of increased sentences, it is our considered opinion that the likelihood of judicial malfeasance is the lesser danger." STATE v. STAFFORD, *supra*, at _____. Unless the defendant can show affirmatively that the second trial judge in imposing a harsher sentence has acted with improper motive, the increased sentence does not deprive the defendant of due process. As was stated in UNITED STATES EX REL. STARNER v. RUSSELL, *supra*, at 811 (quoted with approval in UNITED STATES v. WHITE, *supra*, at

449-50), where a new trial is ordered the judge "may impose a sentence greater than the one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

II. EQUAL PROTECTION

The PATTON Court based its conclusion that the Equal Protection Clause of the Fourteenth Amendment prohibits a sentence in excess of the one invalidated upon the rationale that if all persons confined to prison are considered as a class, only those who choose the right of appeal are subjected to the possibility of receiving a greater sentence. As the Court stated:

> "North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced. Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the State wishes to institute a system permitting upward revision of sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have availed themselves of the right to a fair trial. This is an arbitrary classification offensive to the equal protection clause." 381 F. 2d at 642.

Although all of the states now provide for some method of appeal, a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review. McKANE v. DURSTON, 153 U.S. 684 (1894). Where provision for appeal is guaranteed, "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons . . . from invidious discriminations." GRIFFIN v. ILLINOIS, 351 U.S. 12, 18 (1951).

GRIFFIN held that a defendant was denied equal protection when, because of indigency, he was refused a trial transcript on appeal. The Court stated that those defendants who exercised an appeal represented a class and that this class could be sub-divided as follows: A sub-class composed of those denied trial transcripts on appeal because of indigen-

cy and a sub-class consisting of those who could afford transcripts. Consequently, those able to purchase a transcript maintained an advantage on their appeals and therein lay the equal protection violation. See also, DOUGLAS v. CALIFORNIA, 372 U. S. 353 (1963); BAKER v. CARR, 369 U.S. 186 (1962).

No such classification can be made in either PATTON or PEARCE within the class which seeks to appeal. All defendants exercising their right to appeal are subject to a potentially harsher sentence and all stand on equal footing in their separate appeals. There is no arbitrary discrimination within the class of appellants in the PATTON or PEARCE situation.

III. DOUBLE JEOPARDY

Although stating that "we need not rest our decision on double jeopardy grounds," 381 F. 2d at 643, the PATTON Court held that "the constitutional protection against double jeopardy would be violated if an increased sentence or a denial of credit is permitted on retrial." 381 F. 2d at 643.

It is beyond question that when a defendant obtains a new trial by appealing his conviction he waives his right against reprosecution. BALL v. UNITED STATES, 163 U.S. 662 (1896).

In STROUD v. UNITED STATES, 251 U.S. 15 (1919), reh. den. 251 U.S. 380 (1920), the defendant had been convicted in state court of first degree murder and sentenced to be hanged. That judgment was reversed and the defendant was retried. He was again convicted of first degree murder and this time sentenced to life imprisonment. He again successfully attacked his conviction, was retried, convicted again and sentenced to death. This Court affirmed the conviction, stating that the defendant had not been placed in double jeopardy because "the plaintiff in error himself invoked the action of the Court which resulted in a further trial." Id. at 18. Although the issue of due process was never raised in STROUD, it would appear that upon the facts the opinion of the Court necessarily approved an increased sentence upon retrial after appeal.

This decision was held to be controling in 1960 on a subsequent appeal in the same case. STROUD v. UNITED STATES, 283 F. 2d 137 (10th Cir. 1960) cert, den. 365 U.S. 864 (1961).

The PATTON Court resolved the question of the non-applicability of the double jeopardy provision to the states, as held in STROUD, in a footnote, 381 F. 2d at 643, N. 20, by relying on a second circuit opinion. UNITED STATES EX REL. HETENYI v. WILKINS, 348 F. 2d 844 (2d Cir. 1965).

In HETENYI, Judge (now Justice) Thurgood Marshall pointed out that under the Supreme Court cases "(t)he Due Process Clause of the Fourteenth Amendment imposes some limitations on the states' power to re-prosecute an individual for the same crime." 348 F. 2d at 849. The Court concluded that the double jeopardy clause is applicable to the states because the "basic core" of the double jeopardy guarantees are as fundamental as "those other guarantees of the Bill of Rights already held by the Supreme Court . . . to be absorbed . . . . " Id. at 853.

PATTON further rationalized that this Court intended, by implication, to overrule STROUD in GREEN v. UNITED STATES, 355 U.S. 184 (1957), where this Court held that conviction in the federal courts of a successful appellant at his retrial for an offense greater than that for which he had been convicted at the first trial violated the double jeopardy principle.

It is first pointed out that GREEN was premised on the theory that a conviction of a lesser offense at the first trial was an implied acquittal of all greater offenses with which the defendant had been charged and that this benefit was not waived when he attacked his conviction for the lesser offense. GREEN did not include those cases dealing with harsher punishment at retrial. Moreover, the Court in GREEN made it crystal clear that "STROUD v. UNITED STATES, 251 U.S. 15, 64 L. ed 103, 40 S. Ct. 50, is clearly distinguishable. In that case a defendant was retried for first degree murder after he had successfully asked an appel-

late court to set aside a prior conviction for the same offense." 355 U.S. at 195, N. 15. Furthermore, doubt of an implied vitiation is continued by the language of Justice Brennan in FAY v. NOIA, 372 U.S. 391 (1963), when without referring to STROUD, he said:

> "For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. See, e.g., PALKO v. STATE OF CONNECTICUT, 302 U.S. 319, 58 S. ct. 149, 82 L. ed. 288." 372 U.S. at 439-440.

PATTON also attempted to distinguish STROUD as follows:

> "From a reading of the *Stroud Opinion*, it appears that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder. There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution." 381 F. 2d at 644-645.

In so distinguishing STROUD, PATTON is on a collision course with the holding of this Court in MURPHY v. MASSACHUSETTS, 177 U.S. 155 (1900), to which it made no reference.

In MURPHY, the defendant had his initial sentence imposed by the State of Massachusetts vacated. He was resentenced and appealed to this Court alleging that his constitutional right against double jeopardy and his right to due process of the law had been violated because the new sentence imposed an increased penalty. This Court held the sec-

ond sentence was not invalid because "it might turn out to be for a longer period of imprisonment," and that "the plea of former conviction cannot be maintained because of service of part of a sentence reversed or vacated on the prisoner's own application." 177 U. S. at 162.

MURPHY is still the law of the land. It was held to be controlling in KING v. UNITED STATES, 98 F. 2d 291 (D.C. Cir. 1938).

In KING, the Court of Appeals for the District of Columbia held that a second sentence was not invalid because the first, void because it did not contain the words "at hard labor," was increased. In so holding, the Court said: "Until a convicted prisoner receives a sentence which can withstand attack, it may be conceived that his original jeopardy continues without interruption, and that he is therefore not put in jeopardy a second time when he receives his first valid sentence . . . . A close parallel is the doctrine that when a *conviction* is reversed, the prisoner cannot complain if on a later conviction he is given a severer sentence." Id. at 295.

See also, UNITED STATES v. SANDERS, 272 F. Supp. 245 (E.D. Cal. 1967).

We think the law here was correctly stated by Chief Judge Haynsworth in his dissent in UNITED STATES v. WALKER, 346 F. 2d 428 (4th Cir. 1965): "When a sentence is imposed upon a defendant following a first trial, the Government may not attack it, but the defendant can. If he chooses to do so and succeeds in obtaining a retrial, he suffers no detriment from the sentence imposed after the first trial, and is entitled to no benefit from it. If his second trial results in a conviction, any lawful sentence may be imposed upon him without regard to the sentence passed after the abortive first trial."

"In that situation, of course, a heavier sentence ought not to be imposed upon a defendant because he sought vindication of his legal rights and succeeded in obtaining an order for a new trial. Judicial vindictiveness for resort to judicial processes is morally wrong, but the judge who presides at a second trial has the power and the duty to impose any

sentence authorized by law, which, in light of all the facts and circumstances then known to him, other than the defendant's litigiousness, seems most appropriate and just." Id. at 432.

We firmly believe that the conclusion reached by the PATTON Court that the Fifth Amendment protection against double jeopardy applies to an increased sentence at retrials is erroneous. We are reassured by the brief prepared by Mr. (now Justice) Abe Fortas, counsel for the petitioner in GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963). In reassuring this Court that the overruling of BETTS v. BRADY, 316 U.S. 455 (1942), would not result "in releasing indeterminate numbers of prisoners in some states," counsel for petitioner said: "*First*, it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. (Citations omitted). Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial." (Citations omitted). P. 44 of the brief for petitioner, GIDEON v. WAINWRIGHT.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

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CERTIFICATE

I, ANDREW A. VANORE, JR., one of the Attorneys for the petitioners and a Member of the Bar of the Supreme Court of the United States hereby certify that, in accordance with the instructions by letter dated November 13, 1968, received from the Clerk of this Honorable Court, on the 10th day of December, 1968, I served a typewritten copy of the foregoing brief on the attorney of record for the respondent, by mailing such typewritten copy in a duly addressed envelope with first class postage prepaid addressed as follows:

TO: Larry B. Sitton, Esquire
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I further certify that on the date said brief was received from the printer I served two copies of same upon said attorney in the manner set forth hereinabove.

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